IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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UNITED STATES OF AMERICA,
*Petitioner*

v.

THOMPSON/CENTER ARMS COMPANY, A Division of the K.W. THOMPSON TOOL COMPANY, INC.,
*Respondent*

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On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

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## BRIEF FOR THE RESPONDENT

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## QUESTION PRESENTED

Whether the Contender single-shot pistol and carbine kit, which are intended to be made only as a pistol with a 10″ barrel and as a rifle with a 21″ barrel, nonetheless constitute a rifle having a barrel of less than 16″ in length under the Internal Revenue Code, 26 U.S.C. § 5845(a)(3), even though the United States concedes that use of two receivers would remove these parts from such taxation.

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### STATEMENT OF THE CASE

The Contender sporting pistol has been made by Thompson/Center Arms since 1967. This large, unconcealable pistol with a 10" barrel is a single shot, requiring each cartridge to be loaded and unloaded by hand before another shot can be fired. Out of 400,000 Contender pistols manufactured, the company is unaware of a single person ever using a Contender in a crime. The pistol has taken top honors as the leading pistol for hunting and target competition. (Pet. App. 2a; C.A. App. 56-57.)

The Thompson/Center carbine kit consists of a 21" barrel, a wooden foreend to hold the barrel in place, and a shoulder stock. Removal of the 10" pistol barrel, foreend, and hand grip allows use of the pistol frame or re-

ceiver (the part which holds internal parts and to which the barrel and stock attach) to be assembled with the carbine kit parts to make a carbine (a type of rifle).[1] A hammer, punch, hex wrench, and screwdrivers are required. The following conspicuous warning is molded on the carbine shoulder stock: "WARNING. FEDERAL LAW PROHIBITS USE WITH BARREL LESS THAN 16 INCHES." More detailed warnings to avoid violation of the National Firearms Act ("NFA") are included in the kit instructions. (Pet. App. 2a.)

Sportsmen, who would provide the only market for the Contender pistol and carbine kit, have no incentive to make a rifle with a barrel less than 16". The sportsmen who would use this product are generally law-abiding, and the 10" pistol barrel used with a shoulder stock would have no utility. (C.A. App. 63.)

Nor would criminals have any motive to make a rifle with a barrel under 16" from the Contender pistol and carbine kit. A Contender with a 10" barrel and a huge shoulder stock is even less concealable than a Contender pistol. No criminal demand for single shot firearms exists.[2] (C.A. App. 47.)

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[1] Pictures of the Contender pistol and carbine kit, assembled as a pistol and as carbine, may be seen at Pl. Ex. 5, App. to Mot. of Pl. for Sum. J., A101. The buttstock with warnings, a complete pistol, a complete carbine, and a receiver, are all pictured on *id.* at A102. A videotape of how a pistol and carbine are assembled was filed and referenced at A161(2). Members of the Court are urged to view the videotape. A catalog with the Contender items is found in *id.* at A113.

[2] Indeed, the Bureau of Alcohol, Tobacco, and Firearms ("BATF") has removed large numbers of semiautomatic pistols with instantly attachable shoulder stocks, and rifles with barrels less than 16", from the National Firearms Act. Almost all items on BATF's curio and relic list are short-barrel rifles removed from the NFA because they are "not likely to be used as a weapon." 26 U.S.C. Section 5845(a) (last sentence); C.A. App. 48-49.



A retired BATF expert examined a complete Contender pistol and a complete Contender carbine. It took him over 10 minutes to remove and assemble parts on these guns in such a way as to simulate the time it would take to convert a pistol into a carbine using a carbine kit. (C.A. App. 48.)

Any rifle or shotgun barrel is capable of being readily made into a short-barrel NFA firearm with a hacksaw. A 21" Contender carbine barrel can be cut off in 25 seconds with a common hacksaw. (C.A. App. 103-104.) Moreover, a complete Contender pistol and a complete Contender carbine are capable of having parts exchanged to make an NFA firearm, but BATF concedes that these items do not constitute a short barrel rifle. (Pet. App. 3a, 21a.)

In 1971, Rex D. Davis, the BATF Director, wrote to Thompson/Center as follows:

> You asked if it would be legal to utilize the receiver of the Contender pistol in making up a single shot carbine with a barrel 18 inches long and with a full shoulder stock.
>
> You are advised that the manufacture of a carbine such as you describe, by utilizing a pistol action, would be legal and the firearm so produced would not come within the purview of the National Firearms Act . . . .
>
> In view of the interchangeable barrel capabilities of your Contender action, we believe that it would be in the public interest for you to include a cautionary statement with each firearm. This statement would serve to advise the purchaser that any reduction of the barrel length of the carbine barrel with one of your pistol barrels or otherwise, or the reduction of the overall length of the weapon to less than 26 inches would constitute the making of a firearm within the purview of Section 5845(a) of the National Firearms Act. (C.A. App. 31-32.)

In 1973, BATF addressed the "Sportsman's Kit," consisting of a pistol with interchangeable 16" and 4" barrels and a shoulder stock. The BATF Assistant Director determined that the items are not an NFA firearm, and recommended that the manufacturer provide warnings not to attach the shoulder stock to the gun when the 4" barrel is installed. (C.A. App. 34).

In 1976, BATF opined to the producer of "Texas Contender Firearms" that "Contender Carbine Conversion Kits" are not regulated. "However, the *attaching* of a shoulder stock to a handgun with a barrel of 16 inches or less subjects that fiream" to the NFA. (C.A. App. 35-37.)

In 1983, BATF advised that if a shoulder stock "is *attached* to a pistol or a revolver having a barrel length of less than 16 inches the resultant combination would be classified as a firearm" under the NFA, and recommended a warning to purchasers that payment of the NFA making tax is required "prior to assembling the combination." (C.A. App. 38.) In 1985, BATF again advised that certain combinations of parts of pistols and rifles are not considered NFA firearms unless assembled or intended to be assembled as such. (C.A. App. 40-41.)

The above rulings were disregarded by a subordinate employee who wrote a letter in 1985 claiming that the Contender pistol and carbine kit just introduced by Thompson/Center Arms was a short barrel rifle under the NFA, even though not asesmbled as such. (C.A. App. 26-27.) This litigation followed.

In the Claims Court, the government strongly relied on Rev. Rul. 54-606, 1954-2 C.B. 33, repeatedly assuring the court that it had never been modified or revoked. *E.g.*, Memo. in Opp. to Pl. Mot. for Sum. J. at 4. The court relied on the ruling and on *United States* v. *Drasen*, 845 F.2d 731 (7th Cir. 1988), which in turn relied on the ruling. (Pet. App. 28a.) Neither court was aware that Rev.



Rul. 54-606 was revoked shortly after Congress enacted the specific definitions in Title II of the Gun Control Act of 1968. Rev. Rul. 72-178, 1972-1 C.B. 423-24.

The Court of Appeals held that the Contender pistol and carbine kit is not a rifle having a barrel less than 16" in length because it has not been "made" into such a weapon and is not "intended to be fired from the shoulder" with a short barrel. (Pet. App. 4a-6a.) The court noted that some NFA firearms, excluding a rifle, are defined in terms of a combination of parts from which a complete firearm can be assembled (in some cases, if intent is present).[3] (Pet. App. 7a-8a.)

## SUMMARY OF ARGUMENT

The definitions and legislative history of "rifle" and other relevant terms preclude classification of the Contender pistol and carbine kit as an NFA firearm. "Rifle" is defined as an actual "weapon" that is "made" and "intended to be fired from the shoulder," or is readily restorable, and thus parts intended to be assembled only as a pistol and a long barrel rifle do not constitute a short barrel rifle. By contrast, the NFA broadly defines "machinegun" as a combination of parts, and "destructive device" and "silencer" as combinations of parts plus intent. When Congress intended to define a type of rifle as including a combination of parts, it did so, and even then only if intent is present.

The definitions at issue must be construed in favor of Thompson/Center. In cast of doubt, definitions in a revenue statute with severe criminal penalties and no willfulness element must be construed in favor of the taxpayer and against the United States. Further, the defini-

[3] Contrary to the government (Br. 5), the Court of Appeals was not concerned with combinations of parts to convert a weapon into an NFA firearm, but instead was concerned with contrasting definitions of NFA firearms that included all necessary parts to assemble a complete weapon.

tion of "rifle" must be considered in light of other NFA definitions, which include "combination-of-parts" with or without intent. The agency's official interpretation just after enactment of the statute is entitled to more weight than a contrary position invented by a subordinate employee years later.

This is a case of first impression. No previous decision of any court holds that a pistol and carbine kit constitute a short barrel rifle. While inapplicable to the facts here, *United States* v. *Drasen*, 845 F.2d 731 (7th Cir. 1988) was based on a revenue ruling revoked by the Treasury Department twenty years ago. The Court of Appeals correctly applied the law to the facts here.

## ARGUMENT

### I. THE DEFINITIONS OF "RIFLE" AND OTHER TERMS PRECLUDE CLASSIFICATION OF THE CONTENDER PISTOL AND CARBINE KIT AS AN NFA FIREARM

#### A. The Narrow Definition of "Rifle" Contrasted with Broader NFA Definitions

The Contender pistol and carbine kit is intended for use as a pistol with a 10" barrel and a rifle with a 21" barrel. Neither of these guns or their parts are "firearms" as technically defined in 26 U.S.C. § 5845(a).

Mere ability to convert a gun into an NFA firearm does not make the gun an NFA firearm. Otherwise, all long barrel rifles would be short barrel rifles, merely because the barrels can be sawed off in seconds. Indeed, BATF concedes that possession of a Contender pistol and a carbine (each with its own separate receiver)[4] does not constitute possession of a short barrel rifle unless assembled as such. (Pet. App. 3a, 21a.)

[4] The receiver is the housing to which the barrel, stock, and internal parts attach. See 27 C.F.R. § 179.11 ("frame or receiver").



The purpose of the carbine kit is to make a rifle a 21" barrel, not, as the government states in its version of the Question Presented, to "allow the pistols readily to be converted into rifles with 10-inch barrels."[5] That is like saying that Thompson/Center manufactures rifles with 21" barrels that "allow" the barrels readily to be sawed off, or that "allow" persons readily to murder other persons.

26 U.S.C. § 5845(a) defines "firearm" to include "(3) a rifle *having* a barrel or barrels of less than 16 inches in length; (4) a weapon *made* from a rifle if such weapon *as modified* has an overall length of less than 26 inches or a barrel or barrel of less than 16 inches in length." (emphasis added). The Court of Appeals determined that the Contender pistol and carbine kit is not a "firearm" or a short barrel rifle under either definition. (Pet. App. 4a-5a.) As its version of the Question Presented reflects, the government does not disagree with the court's determination that § 5845(a)(4) does not apply here.[6]

The definition of "rifle" in 26 U.S.C. § 5845(c) is as follows: "The term 'rifle' means a *weapon* designed or redesigned, *made or remade*, and *intended* to be fired

[5] Also in the Question Presented the government incorrectly asserts that Thompson/Center "manufactures" conversion kits. Kits were manufactured only for a brief period in 1985. Only one pistol and carbine kit were possessed as a unit in connection with the payment of the $200 tax and the claim for a refund. C.A. App. 129.

[6] Count 1 of the Complaint alleged that the Contender pistol and carbine kit is not a firearm in the meaning of 26 U.S.C. § 5845(a)(3). Count 2 of the Complaint alleges that use of a Contender pistol receiver to make a carbine, and then use of the same receiver to remake the pistol, does not constitute making a weapon from a rifle in the meaning of 26 U.S.C. § 5845(a)(4). Count 3 alleges that the pistol and carbine kit is not otherwise a "firearm" as defined in § 5845(a). Since the United States conceded that the items were not encompassed under these definitions, other than § 5845(a)(3) (Mot. of the U.S. for Sum. J. & Brief at 17), the Claims Court concluded that "counts two and three of the complaint are not issues in this case." (Pet. App. 22a.)

from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be *readily restored* to fire a fixed cartridge." Other than the "readily restored" clause which was added in 1968, this definition was adopted in 1954 [7] to narrow the scope of rifles being interpreted as subject to the NFA.[8]

A Contender pistol and carbine kit fit neither of the two definitions of "rifle" having a barrel less than 16 inches. Mere parts never assembled as such neither constitute a "weapon" that is "made" and "intended to be fired from the shoulder," nor are they "restorable" to something they have never been.[9]

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[7] P.L. 83-591, 68A Stat. 3, 726 (1954). A further clarifying amendment was made in 1958. Pet. App. 9a.

[8] As stated in H.R. Rept. 1337, 83d Cong., 2d Sess. 524, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4542, "rifle" and two other terms needed defining because:

> Many weapons firing projectiles by the action of an explosive have been brought within the scope of the National Firearms Act although it is believed the Congress did not intend that such weapons should be included. . . . It is felt that these restrictions should be removed in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters. Moreover, for proper administration of the National Firearms Act it is considered highly proper and desirable that the Congress define the terms "rifle," "shotgun", and "any other weapon" so as to remove any doubt as to the type of firearms which Congress intended to bring within the scope of the National Firearms Act.

[9] "The 'readily restorable' definition defines *weapons which previously could shoot* . . . but will not in their present condition." ATF Ruling 83-5, ATFB 1983-3, 35. "The term which Congress saw fit to use in the statute, 'restorable', is defined by Webster 'to bring back to a former or normal condition, as by repairing. . . .'" *United States* v. *Seven Miscellaneous Firearms*, 503 F.Supp. 565, 574 (D.D.C. 1980).



The NFA also includes the following definition: "The term 'make' and the various derivatives of such word, shall include manufacturing . . ., *putting together*, altering, any combination of these, or otherwise producing a firearm." [10] 26 U.S.C. § 5845(i). Thus, "the term rifle means a weapon . . . *made or remade*" (§ 5845[c]), and "the term 'make' . . . shall include . . . *putting together*" (§ 5845[i]). The definition of "make" as "putting together" would have no meaning if a mere combination of parts which had never been put together as such constituted "a rifle *having* a barrel or barrels of less than 16 inches in length" as used in § 5845(a)(3).

By contrast, three types of NFA firearms—machineguns, destructive devices (including rifles over .50 caliber), and silencers—are defined in terms of combinations of parts, and thus are "made" even before being "put together." These firearms are "made" when a combination of parts from which such firearms may be assembled are "manufacture[ed] . . . or otherwise produc[ed]" (§ 5845[i]), subject to, in the case of silencers and rifles over .50 caliber, certain intent and/or design requirements.

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[10] This was originally adopted in 1952 and slightly reworded in 1968 to its present form. *See* P.L. 353, 66 Stat. 87 (May 21, 1952). "The purposes of the bill is to bring the *act of making* sawed-off shotguns and rifles, or otherwise *transforming* a weapon into a firearm. . . ." H.R. Rept. 1714, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin. News 1454 (emphasis added). The report noted that short barrel guns become available "by the comparatively simple device of purchasing standard shotguns from legitimate dealers and then sawing off the barrels. . . ." *Id.* at 1455. The solution was not to require the manufacturer to make a barrel incapable of being sawed off, but to punish "the action of sawing off the barrel or otherwise *making* such firearm" without first paying the tax and registering the gun. *Id.* at 1456. (emphasis added).

On the House floor, Congressman Jenkins "assure[d] the sportsmen and hunters and those dealing in guns and firearms that this does not invade the sportsmen at all." 98 CONG. REC. 3616 (Apr. 7, 1952).

The 1968 Act broadened the definition of machinegun to include all parts necessary to make a machinegun. 26 U.S.C. § 5845(b) provides: "The term 'machinegun' means . . . *any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.*" No such definition exists for rifle. However, like rifle, machinegun is also defined in terms of "any weapon which shoots . . . or can be readily restored to shoot". Obviously, the "weapon" and "restorable" definitions do not reach a combination of parts from which a weapon could be, but never has been, assembled.

A machinegun did not include a mere combination of parts before that explicit definition was adopted in 1968. An analysis by the Judiciary Committee of the new definition stated:

> It provides three new categories as included within the term "machinegun": . . . (3) any combination of parts from which a machinegun can be assembled if such parts are in the possession of a person. *This is an important addition to the definition of "machinegun"* and is intended to overcome problems encountered in the administration and enforcement of existing law. Gun Control Act of 1968, Senate Report (Judiciary Committee) No. 1501, Sept. 6, 1968 [to accompany S. 3633], at 45-46. (Emphasis added.)

The above analysis also discussed the addition of the "readily restorable" language to the definitions of rifle and shotgun as intending to encompass a gun without a firing pin. *Id.*

The 1968 Act broadly defined a "destructive device" in § 5845(f) in part as follows:

> . . . (2) any type of weapon by whatever name known which will, or which may be *readily converted* to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . .; and (3) *any combination of parts either designed or intended* for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and *from which a destructive device may be readily assembled.* The term "destructive device" shall not include any . . . rifle which the owner intends to use solely for sporting purposes. (Emphasis added.)



The above was intended to include large bore military rifles without sporting uses, and combinations of parts intended to be assembled as such. The NFA definitions of both "rifle" and "destructive device" include fully made (assembled) weapons. However, while a "rifle" (including a short-barrel rifle) includes "any such weapon which may be *readily restored* to fire a fixed cartridge," a rifle with a bore of more than one-half inch in diameter is a destructive device if it "may be *readily converted* to expel a projectile". The broader "readily converted" language does not require that a device have previously been a destructive device. The "readily-converted" definition could not practically apply to "rifle," since every rifle is readily convertible to a short barrel rifle by use of a hacksaw.

Neither definition includes a mere combination of parts from which a short barrel rifle or rifle with bore over one half inch can be assembled. Only the latter includes "any combination of parts either *designed or intended* for use in converting any device into a destructive device . . . *and* from which a destructive device may be readily assembled."[11] § 5845(f)(3).

In the Firearms Owners' Protection Act of 1986, Congress revisited and had ample opportunity to expand the

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[11] While "intended" normally refers to the intent of the person in possession, "design" refers to the intent of the manufacturer and the predominant use of a product. A product merely capable of illegal use is not "designed" for the illegal use. Thus, "items which are principally used for nondrug purposes, such as ordinary pipes, are not 'designed for use' with illegal drugs." *Hoffman Estates* v. *Flipside*, 455 U.S. 489, 501 (1982).

definition of particular firearms by addition of "combination of parts" language such as already existed for machineguns and destructive devices. It did enact similar language in reference to silencers,[12] but did not do so in reference to the term "rifle." 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24), provides: "The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned, and *intended for use in assembling or fabricating* a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." This precludes any interpretation that a mere combination of parts, without intent, is a silencer.

By such enactments,[13] Congress has again clearly expressed its intent that a combination-of-parts definition does not apply to rifles, and that even where it applies to certain NFA firearms, an intent requirement may exist.[14]

BATF concedes that a combination-of-parts theory does not apply to possession of a complete pistol and a complete carbine, but illogically argues such theory if only one receiver is present, even though the pistol and carbine kit are expressly not intended to be assembled as a short barrel rifle. Nothing in the NFA justifies this expansion of the statute.

The government distorts the Court of Appeals' discussion of contrasting "combination-of-parts" definitions. The Court was concerned with the definitions of machinegun, destructive device, and silencer as including a complete combination of parts from which such weapons could be assembled (with various intent standards), and the lack of any such definition of rifle. Pet. App. 7a-8a. Yet the government misreads the court as being concerned with a combination of parts to *convert* a weapon into a rifle.[15] Br. 19. The court did not remotely suggest, as does the government, that this case concerns whether a conversion kit alone is regulated by the NFA.

The government claims that the Court of Appeals concluded that a "firearm"—by implication, any NFA "firearm"—is not "made" until assembled. Br. 10-11, 25. Yet the court acknowledged the varied definitions of "firearm" in the NFA, which defines certain weapons as being made when a complete combination of unassembled

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[12] Moreover, in connection with a new provision in 18 U.S.C. § 921(a)(17)(B) concerning certain ammunition, the following definition was enacted: " 'handgun' means any firearm including a pistol or revolver designed to be fired by the use of a single hand. *The term also includes any combination of parts from which a handgun can be assembled.*" P.L. 99-408, § 10, 100 Stat. 920 (Aug. 28, 1986) (emphasis added).

[13] In the Crime Control Act of 1990, Congress amended the Gun Control Act to provide that "it shall be unlawful for any person to *assemble from imported parts any semiautomatic rifle* or any shotgun" which has not been approved for importation. 18 U.S.C. § 922(r). In other words, a "rifle" does not exist until it is "assemble[d]" from "parts" (in this case, "imported parts").

[14] The definitions of "destructive device" and "firearm silencer" both require that the combinations of parts be designed and/or intended to be assembled as such. Only "machinegun" does not include the intent requirement. "Rifle" has no combination of parts definition, with or without intent.

[15] For the first time, the government is interjecting the irrelevant definition of machinegun as including "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun. . . ." 26 U.S.C. § 5845(b). Only the next phrase of that subsection is relevant here—"any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

Contrary to the government, destructive device is not defined to include a mere conversion kit. Br. 19 n.17. Rather, 26 U.S.C. § 5845(f)(3) requires that all the parts to assemble a complete destructive device must be present: "any combination of parts either designed or intended for use in converting any device into a destructive device . . . *and from which a destructive device may be readily assembled.*"

parts is possessed, but does not so define rifles. (Pet. App. 6a.) The court's opinion is not a serious threat to the enforcement of the NFA because it does *not* require that just *any* NFA "firearm" be assembled. The court ruled that a pistol and carbine kit which will never be assembled as a short barrel rifle, is not such a rifle. The opinion does not address other NFA "firearms" except to acknowledge that some types (such as machinegun) need not be assembled.

The government contradictorily asserts that sporting or criminal use in defining a weapon is irrelevant, but that the court's opinion will allow weapons of mass destruction. Br. 14, 26. It raises the bogeyman word "Uzi," failing to note that normally that term refers to a machinegun and thus is subject to a combination of parts definitions.[16] Generally, a short barrel rifle is less likely to be used in crime than any other type of firearm, including a long barrel rifle. (C.A. App. 47-48; Pl. Ex. 2, App. to Mot. for Sum. J., A58.) BATF has removed numerous short barrel rifles, including semiautomatics, from the NFA because they are not likely to be used as weapons.[17] Under these circumstances, the Court of Appeals' opinion—that items that will never be made into a short barrel rifle do not constitute a short barrel rifle—will not cause the sky to fall.

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[16] A cosmetically-similar semiautomatic model Uzi is imported into the United States only because BATF found it to be particularly suitable for sporting purposes. 18 U.S.C. § 925(d)(3); *United States* v. *Rose*, 695 F.2d 1356, 1357 (10th Cir. 1982), *cert. denied*, 464 U.S. 836 (1983). As in the case at bar, "the carton, the instructions, and the firearm itself contained warnings that modification of the firearm was unlawful." *Id.* No one would suggest that the importer was responsible for the owner quickly and easily sawing off the barrel in that case.

[17] *See* 26 U.S.C. § 5845(a) (last sentence).



### B. The Government Would Expand The Definition to Include A Product Capable Of Being Made Into A Taxable Rifle

Any conventional rifle can be made into an NFA firearm in a few seconds by sawing off the barrel. The government argues that mere capability of being made into an NFA firearm causes the Contender pistol and carbine kit to be an NFA firearm.

The government assumes that there is nothing to prevent a consumer from attaching the shoulder stock to the pistol.[18] Imprisonment of ten years and a $10,000 fine seems adequate incentive to encourage consumers to obtain the Secretary's permission and pay a $200 tax before making a short barrel rifle. 26 U.S.C. §§ 5821, 5822, 5861(c), (f), 5871. The government could also argue that there is nothing to prevent a dealer from selling Contender pistols and not paying income tax on the profits. Yet Thompson/Center is no more responsible for some one else's failure to pay a tax than it would be responsible for a murder committed with a Contender pistol and carbine kit.[19]

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[18] At bottom, the government seems to be arguing that Thompson/Center must make a firearm physically incapable of violating the law—the tax law, that is, not the laws against murder. Yet a barrel incapable of being sawed off is incapable of being manufactured. Nothing in the statute requires the company to make a firearm incapable of being assembled into a short barrel rifle without first obtaining the Secretary's permission.

[19] The courts have uniformly held firearms manufacturers not liable in tort suits where a criminal misused a firearm. One such case, *Marilia* v. *Stoeger Industries*, 574 F. Supp. 107, 110 n.3 (D. Mass. 1983) noted:

> Oliver Wendell Holmes, in his *Collected Legal Papers*, 131-132 (1952) explained his theory against holding the manufacturers and sellers of guns liable as follows:
>
> > If notice so determined is the general ground for liability, why is not a man who sells firearms answerable for as-

In a *post hoc* litigation argument suggested for the first time now, the government argues that BATF only conceded that "the separate marketing" of a complete pistol and a complete carbine does not fall within the NFA. (Br. 3 n.4, 16.) To the contrary, BATF advised: "The possession of a complete rifle and a complete pistol is not within the scope of the NFA unless components of the weapons are actually assembled as a firearm, such as a short-barreled rifle, that is covered by the NFA." (C.A. App. 100, 43; Pet. App. 3a, 21a.)

At oral argument, counsel showed the Claims Court a complete pistol and a complete carbine—each with its own separate receiver—and illustrated with various tools how the barrels, foreends, shoulder stock, and grip are removed and assembled. (C.A. App. 107-109). The government uses this demonstration to argue that a pistol and carbine *kit* may be used to "create" an NFA firearm. (Br. 3 n.3.) In fact, it showed that a complete pistol and a complete carbine—which is concededly not an NFA firearm—can be used to make such a firearm.

This demonstrates the absurdity of BATF's "one receiver" theory. If the pistol and carbine kit use the same receiver, a short barrel rifle allegedy exists, even though one is never created. If two receivers are present—one for the pistol and one for the carbine—a short barrel rifle

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> saults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol of him for some unlawful end? . . . The principle seems to be pretty well established . . . that everyone has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be.

Similarly, Thompson/Center is entitled to rely on purchasers of a pistol and carbine kit acting lawfully.



admittedly does not exist. Nothing in the statute sanctions this contradictory result.[20]

The NFA defines some firearms as combinations of parts (machineguns), others as combinations of parts with intent (destructive devices, silencers), and still others without any such definition (rifles). The government ignores these differences and claims that rifles are implicitly defined the same as machineguns.

"Rifle" means a "weapon" that has been "made" (§ 5845(c)), not parts from which a weapon "can be made." *Any* rifle "can be made" into an NFA firearm by sawing off the barrel.[21] Moreover, the definition of the term "make" in § 5845(i) as including "putting together" means that something must be "put together" before it is an NFA firearm, or this definition would not exist. It must be an NFA firearm—such as "rifle"—that is not defined as a combination of parts. The government's focus on the definition of "make" as "or otherwise producing a firearm" begs the question, for it does not address when a firearm is produced.

The government assumes that lack of intent to make a Contender pistol and carbine kit into a short barrel rifle is irrelevant. However, all the evidence in the record is that no owner would have any intent to make

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[20] *TVA* v. *Hill*, 437 U.S. 153, 173 n.18 (1978) nicely describes BATF's position in this case:

> This recalls Lewis Carroll's classic advice on the construction of language:
>
> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what *I* choose it to mean—neither more nor less." Through the Looking Glass, in The Complete Works of Lewis Carroll 196 (1939).

[21] The government seems to assume that if a tax crime can be "quickly and easily" committed, then it already has been committed. Yet one has not murdered someone just because one could "quickly and easily" do so, and one has not violated the Internal Revenue Code just because one could "quickly and easily" do so.

such a rifle. The very definition of rifle includes the terms "*intended* to be fired from the shoulder." § 5845 (c). It was never suggested in this case that Thompson/Center or anyone else did or would possess a pistol and carbine kit with the intent to make a weapon with a short barrel to be fired from the shoulder.[22]

The government argues that Congress would not have adopted a readily-restorable test without implicitly adopting a readily-convertible (or readily-makable) test. Br. 17-18. Congress did not do so, because every rifle is readily convertible in seconds by sawing to be a short barrel rifle, and also perhaps because pistol and rifle parts may be interchangeable. Perhaps Congress adopted a readily restorable test because an item had been a functional NFA firearm, was presumably possessed with intent to restore to such a weapon, and could be so restored in seconds such as by using a nail for a firing pin, as in *United States* v. *Cosey*, 244 F.Supp. 100, 102 (E.D.La. 1965). The Contender pistol and carbine kit "can be assembled"—the government is careful not to say "restored" —into a short-barrel rifle in about five to ten minutes. (Br. 16; C.A. App. 48.) Any such act would require intention and deliberation.

The government suggests that the Court's opinion would have a detrimental impact on enforcement of the firearms laws. No basis exists for this assertion. The

[22] The government seeks to change facts by linguistics in arguing that " 'complete kits' for assembling a regulated firearm are subject to regulation under the Act" (Br. 6), yet the government ignores that the Contender kit is *for* assembling a *non*regulated firearm. It asserts that the pistol and carbine kit "is literally a weapon 'designed . . . and intended to be fired from the shoulder' with 'a barrel or barrels of less than 16 inches in length' " (Br. 10), when in fact the "weapon" is literally "intended" to be fired from the shoulder with a barrel of 21″ in length. Similarly, instead of "the short barrel rifle resulting from use of its conversion kit" (Br. 9 n.7), there is a *long* barrel rifle resulting from use of the carbine kit.



only practical impact of the decision is that consumers need not purchase a complete pistol and a complete rifle—each with an identical receiver—but may purchase a pistol and rifle parts with only one receiver for use with each.

The government argues that some products, such as a bicycle, are shipped unassembled.[23] Br. 11. To use the same analogy, no one would say that bicycle handle bars are clubs, or that chains are weapons, just because they could be so used. Further, a bicycle is intended to be assembled into one and only one product, and is not defined in technical, legal terms in a taxing statute with criminal penalties. A better analogy would be a bottle, gas, and a rag, which constitute a Molotov-cocktail—an NFA "destructive device"—only if assembled or intended to be assembled as such.[24]

The government (Br. 10) misreads *Haynes* v. *United States*, 390 U.S. 85, 88 (1968), which states only that "the acts of *making* and *transferring* firearms are broadly defined," not that the firearms themselves are broadly defined. *See United States* v. *Biswell*, 406 U.S. 311, 313 n.2 (1972) ("the sawed-off rifles . . . fell under 26 USC § 5845's technical definition of 'firearms' "). In fact, the NFA definition of "firearm" encompasses such guns as are generally known to be highly regulated, not such innocuous sporting guns as a Contender pistol and carbine kit.[25] The National Firearms Act "may well be premised

[23] The government also states that rifles may be sold with bolts detached, and that shotguns have removable barrels. Br. 11 n.8. There is nothing in the record concerning this point. It could be that any such bolts may be inserted in five seconds.

[24] As stated in *United States* v. *Posnjak*, 457 F.2d 1110, 1119 (2nd Cir. 1972): "When, however, the components are capable of conversion into both such a device and another object not covered by the statute, intention to convert the components into the 'destructive device' may be important."

[25] As stated in *United States* v. *Anderson*, 885 F.2d 1248, 1250 (5th Cir. 1989) (en banc):

[Continued]

on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons. . . ." *United States* v. *Freed*, 401 U.S. 601, 609 (1971). As noted by Justice Brennan, concurring: "the firearms covered by the Act are major weapons such as machine guns and sawed-off shotguns. . . . Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it." *Id.* at 616.

The government position in this case does not pass the above "smell test" set forth in *Freed*. None of the tens of thousands of sportsmen who own Contender pistols and carbine kits made by other companies (C.A. App. 58), would ever guess that they possess a "major weapon" and an NFA firearm. Defendant argues that the NFA is applicable to "gangster-type" weapons,[26] but then asserts that it is irrelevant that the Contender pistol and carbine kit is not a criminal-type weapon. (Br. 8). Defendant's argument reduces to bureaucratic hair-splitting nowhere suggested in the statute: an NFA firearm exists if only one Contender receiver is used to make a pistol and carbine, but does not exist if a person uses two identical

[25] [Continued]

> As used in the Act, the word "firearms" is a term of art that includes primarily weapons thought to be of a military nature and of no legitimate use for sport or self-defense. . . .
>
> Instead, the term is defined in the Act so as to narrow its meaning vastly in most respects. . . . Generally speaking, all such categories of ordinary rifles, pistols and shotguns as might be found in a gun shop are excluded from its meaning. . . .

[26] The government leaps from the premise that the Gun Control Act of 1968 was passed in reaction to the assassination of national leaders, to the conclusion that Congress must have tacitly enacted the same definition of a rifle as it explicitly wrote for a machinegun. (Br. 20-22.) It goes without saying that "made" and "rifle" were defined by legislation enacted in 1952 and 1954 respectively, and were only slightly modified in 1968.



Contender receivers, one for the pistol and one for the carbine. Nothing in the statute even hints at this arbitrary distinction invented by the agency.

## II. AN AMBIGUITY IN A TAXING STATUTE WITH SEVERE CRIMINAL PENALTIES MUST BE CONSTRUED IN FAVOR OF THE TAXPAYER

Given the clear language of the statutory definitions, the Contender pistol and carbine kit do not constitute taxable "firearms" under § 5845(a). At the very least, considerable doubt exists as to whether the items are taxable.[27] Any ambiguity in a taxing statute with severe criminal penalties and no willfulness requirement must be construed in favor of the taxpayer. No deference is due to the agency construction of a criminal statute where the construction was invented long after adoption of the statute.

First, like all other taxing statutes, this one comes under the rule set forth in *Gould* v. *Gould*, 245 U.S. 151, 153 (1917):

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

The definitions in the National Firearms Act are subject to the above rule of construction. "On its face it [the NFA] is only a taxing measure . . . ." *Sonzinsky* v.

[27] The government claims that the items here are "clearly" regulated weapons. Petition 5. In the court below it conceded: "When the facts of this case are compared to the language of § 5845, the statutory terms alone do not clearly indicate whether the Contender pistol and conversion kit together constitute a firearm." Appellee Brief 12.

*United States*, 300 U.S. 506, 513 (1937).[28] "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." *Id.* at 512.

*Auto-Ordinance Corp.* v. *United States*, 822 F.2d 1566 (Fed. Cir. 1987) held certain firearm accessories which attached to a carbine not to be subject to a manufacturer's excise tax.[29] The Court reasoned:

> The best that can be said for the position of the defendant is that there may be some doubt as to the meaning of the word accessories in the pertinent regulation. Even assuming the existence of doubt, it is established that, in a tax refund case, the doubt should be resolved in favor of the taxpayer. See *White* v. *Aronson*, 302 U.S. 16, 20 . . . (1937). . . . (822 F.2d at 1571.)

The *White* case, which concerned whether certain items are taxable sporting goods, held:

> Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. . . . "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them." 302 U.S. at 20-21.

Second, since it provides serious criminal penalties for violation, and does not even have a willfulness requirement (which exists in most tax statutes), the National Firearms Act must be interpreted in favor of lenity. "We are here concerned with a taxing act which imposes a penalty. The law is settled that 'penal statutes are to be construed strictly,' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it'. . . ."[30] *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959).

[28] *Haynes* v. *United States*, 390 U.S. 85, 88 (1968) described the National Firearms Act as "an interrelated statutory system for the taxation of certain classes of firearms." "The making and transfer taxes under the NFA are a form of excise tax." *Thompson/Center Arms Co.* v. *Baker*, 686 F. Supp. 38, 42 (D.N.H. 1988) (holding that the Contender carbine kit must be litigated as a tax refund claim).

[29] It is well established that a "kit" which could be assembled as a non-taxable article as well as a taxable article, is not subject to tax. *Tandy Leather Co.* v. *United States*, 347 F.2d 693, 694-95 (5th Cir. 1965).



The presence in the NFA of three vastly different "combination of parts" definitions, and the absence thereof in the definition of "rifle," indicates that no such definitions apply to "rifle." *Commissioner* v. *Engle*, 464 U.S. 206, 223 (1984) states: "We must dismiss the Commissioner's reconstruction of the legislative intent as mere wishful thinking . . . . We have noted that '[t]he true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections. . . .'"

*Russello* v. *United States*, 464 U.S. 16, 23 (1983) distinguishes a section of a criminal statute which "speaks broadly" of certain acts, from other sections with "less expansive language," and states:

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each.

[30] "'Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' . . . 'When choice has to be made between two reading of what conduct Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971) (construing Gun Control Act terms in favor of felon in possession of firearm).

"Rifle" having no definition like "combination of parts when possessed with only one receiver," such definition may not be imposed by bureaucratic or judicial fiat. As stated in *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687-88 (1962):

> We are not at liberty . . . to add to or alter the words employed to effect a purpose which does not appear on the face of the statute . . . Nevertheless, the Government now urges this Court to do what the legislative branch of the Government failed to do or elected not to do. This of course, is not within our province.

The government argues that the kit would allow a manufacturer to "avoid the tax."[31] Br. 11. Yet it is perfectly legitimate to avoid taxation simply by not making a taxable product.[32] *Comm'r* v. *First Security Bank of Utah*, 405 U.S. 394, 398 n.4 (1972) notes:

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[31] District Judge Getzendanner wrote in *United States* v. *Drasen*, 665 F. Supp. 598, 612 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied* 488 U.S. 909 (1988):

> It is clear that a person can now evade the federal regulations relating to the sale of short-barrel rifles (the conduct charged here) by simply selling long-barrel rifles to buyers who can then easily alter those rifles into short-barrel rifles by way of a hacksaw. The specter the government raises of unprecedented circumvention of an otherwise carefully drafted scheme regulating the sale of short-barrel rifles is therefore unrealistic given that the statute already permits possibilities for circumvention.

[32] The government's fear about "circumvention" of the NFA (Br. 7, 14) ignores that this case applies the statute only to the product in question, and it is clear that the Contender system is not a rifle "having" a barrel less than 16" in length which is "made" and "intended to be fired from the shoulder." Application of § 5845(a)(3), (c) to other products depends on the specific facts and intent in those cases. Certainly a person who deals in long-barrel rifle parts could also "possess independently a single short-barrel part (which is being used for some unrelated, innocent purposes). . . ." *United States* v. *Drasen*, 665 F. Supp. at 613. By contrast, the government could prove that a short barrel has been assembled onto a rifle by physical evidence or by admissions. It is hardly too much to ask that a *malum prohibitum* tax statute require the prosecution to prove intent, when all homicide statutes do so. "A court should not judicially rewrite a statute to alleviate some of the burdens of proof Congress has apparently chosen to place on the government." *Id.*



> Taxpayers are, of course, generally free to structure their business affairs as they consider to be in their best interests . . . . Perhaps the classic statement of this principle is Judge Learned Hand's comment in his dissenting opinion in Commissioner v. Newman, 159 F.2d 848, 850-851 (CA2 1947):
>
> "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant."

Thirdly, the government appeals to the divine right of deference to agency opinion, neglecting that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[33] *Cherron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Even when appropriate, the *Chevron* deference rule normally applies in construction of civil

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[33] Courts have rejected BATF opinions about what are "firearms" in both civil and criminal cases. *E.g.*, *Davis* v. *Erdmann* 607 F.2d 917, 920 (10th Cir. 1979) (BATF position that item was likely to be used as a weapon "appears to be a classic example of agency 'nit picking,' and an arbitrary and capricious action."); *United States* v. *Brady*, 710 F. Supp. 290, 293 (D. Colo. 1989) (regarding a device "that as a matter of practicality and common sense would never be used for that purpose [as an NFA firearm] by a sane person."); *United States* v. *Seven Miscellaneous Firearms*, 503 F.Supp. 565, 570 (D.D.C. 1980) (finding items not be a short barrel rifle or other NFA firearms); *United States* v. *Green*, 515 F.Supp. 517, 521 (D. Md. 1981) ("the agency interpretation is entitled to no deference whatsoever.").

statutes without serious criminal penalties. No deference is due an agency in interpretation of a criminal statute, even when applied in civil cases.[34] *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954).[35] As Justice Stevens wrote in *Crandon* v. *United States*, 110 S.Ct. 997, 1001-02, 108 L.Ed.2d 132 (1990): "Because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage." [36]

Moreover, to which agency's opinion should the Court defer? The private letter rulings to Thompson/Center and other entities between 1971 and 1985 show that the agency

[34] The NFA is litigated almost exclusively in criminal prosecutions, and violation requires proof of neither wilfulness nor knowledge. *See* 26 U.S.C. § 5861. By contrast, most tax statutes are applied primarily in civil contexts, wilfulness is typcially required for a criminal prosecution, and Congress delegated more regulatory power to Treasury in such matters. Thus, *United States* v. *Correll*, 389 U.S. 299 (1967) and similar cases cited by the government (Br. 15) have no relevance here.

[35] In that case, the agency was empowered to "make such rules and regulations . . . as may be necessary in the executions of its functions. . . ." *Id.* at 290 n.7. Nonetheless, the Court held:

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. . . . It would do violence to the well-established principle that penal statutes are to be construed strictly. *Id.* at 296.

[36] The concurring opinion by Justice Scalia, with whom Justices O'Connor and Kennedy joined, explains in more detail:

> To give persuasive effect to the Government's expansive advice-giving interpretation of [the statute] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity. *Id.* at 1011-12.



interpreted the statute to exclude a pistol and carbine kit from the definition of an NFA firearm just after passage of the 1968 Act. (C.A. App. 31-42.) These rulings are inconsistent with the agency position invented in 1985.

The official interpretation adopted just after passage of the 1968 Act and consistently applied thereafter has far more weight than the abrupt shift made without prior management review in 1985. (C.A. App. 26.) See *Rice* v. *Rehner*, 463 U.S. 713, 730 n.13 (1983) ("that early position . . . is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary"). The following administrative history further undercuts the government's appeal to agency deference.

Congress defined "make" in 1952, and "rifle" in 1954. Treasury adopted a regulation defining "make" which clearly stated that parts must be put together. 17 F.R. 7842, 7846 (Aug. 28, 1952); 20 F.R. 6739, 6740 (Sept. 14, 1955). As stated in 26 C.F.R. § 179.29 (1955):

> *Making of a firearm.* The "making of a firearm" shall mean the production or creating of a firearm by any means, whether by manufacture, putting together of parts, alteration, any combination thereof, or otherwise, and by any process of manipulation or transformation of any other weapon.
>
> *Examples*: (1) The sawing off of a barrel or barrels of a shotgun to a length of less than 18 inches, or (2) the altering of a semiautomatic pistol by the change or addition of parts so as to produce a fully automatic or machine gun type of firearm.

Thus, "making" included "putting together of parts"—not mere possession of parts. Further, if "manufacture" or "otherwise" meant mere possession of parts, then "putting together of parts" would be superfluous. Again, the terms "manipulation or transformation of any other weapon" also suggest that the parts of a non-NFA weapon be manipulated or transformed so as to assemble an NFA firearm.

The two examples above also suggest that mere capacity to make an NFA firearm did not constitute an NFA firearm. The barrel of a shotgun must be actually sawed off. A semiautomatic pistol must actually be altered by having its parts changed or added to, before it would be a machinegun. (This was before enactment in 1968 of combination-of-parts language for a machinegun.)

Treasury has long been aware that some pistols and rifles are designed to utilize identical receivers, as do the Contender pistol and carbine. Rev. Rul. 56-296, 1956-1 C.B. 553-554 discussed two single shot pistols "employing *an 'action' [i.e., receiver with parts*[37]*] susceptible but not confined to use in either a single shot pistol or rifle*, and designed to be aimed and fired from the hand. Accordingly, such pistols are not firearms within the intent of § 5848 of the Code." (Emphasis added.)

Similarly, Rev.Rul. 59-340, 1959-2 C.B. 375-376 found a pistol and rifle kit utilizing the same receiver not to be a short barrel rifle:

> With the pistol barrel removed, the basic mechanism can be inserted into a one piece rifle frame with a .22 caliber barrel having a length of over 16 inches. Held, the Unique Model L, pistol and rifle attachment, a combination pistol and rifle, is not a firearm within the purview of the National Firearms Act. . . .

The revenue rulings cited by the government do not apply to the Contender pistol and carbine kit. (Br. 15, 17.) Rev.Rul. 61-45, 1961-1 C.B. 663, concerns a Mauser or Luger semiautomatic pistol with a short barrel and a shoulder stock. "The shoulder stock attaches to the pistol instantly or in a matter of one or two seconds." (C.A. App. 49.) Pistols with instantly attachable shoulder stocks and *only* a short barrel are intended to be short barrel

[37] "Action. The working mechanism of a firearm." Glossary of the Association of Firearm and Toolmark Examiners 1 (1985).



rifles, and after being put together just once, are "readily restorable" as such. Yet Treasury held that if they also have barrels over 16" for use when the shoulder stock is attached, the same pistols are *not* short barrel rifles. As Rev.Rul. 61-203, 1961-2 C.B. 224 states: "Where one of the above described pistols has a barrel of 16 inches or more in length, it is held not to be a 'firearm,' within the definition of section 5848(1) of the Act, even though such weapon has an attached or attachable shoulder stock." [38]

BATF opined in 1985 that a pistol and shoulder stock must be intended to go together, and that mere attachability does not imply an offense if a legitimate purpose exists:

> Certain Luger pistols with shoulder stocks have been removed from the provisions of the NFA. If a person possessed such a Luger with a stock, and also possesses other Lugers which were not exempted with the stock, the person would not possess an NFA firearm unless the stock was actually fitted to one of the non-exempt Lugers, or unless there was some evidence to show that the stock was actually meant for a non-exempt Luger. (C.A. App. 42.)

Similarly, this 1985 opinion stated that a Thompson (no relation to Thompson/Center) rifle and pistol with easily interchangeable barrels were not an NFA firearm "unless the person actually assembled a short-barrelled rifle. . . ." *Id.* at 40. By contrast, an UZI rifle and a short barrel, and an unassembled silencer, were NFA firearms (*id.*), apparently because these items could be assembled *only* as NFA firearms. A "conversion kit" to make an UZI short barrel rifle is clearly not analogous to a Contender carbine kit to make a long barrel rifle. (*See* Br. 14 n.14).

[38] Rev. Rul. 61-45 and 61-203 were "modified so that the rulings do not apply to the listed guns with accompanying shoulder stocks. . . ." (List deleted.) Rev. Rul. 70-517, 1970-2 C.B. 327.

The silencer kits discussed by the government may be assembled only as silencers. (Br. 6-7 and 23, citing H.R. Rep. No. 495, 99th Cong., 2d Sess. 21 (1986).) The government relies on the statement of Edward M. Owen, BATF technician, that a complete silencer kit is a silencer. Br. 23 n. 20. This is the same Mr. Owen who previously wrote that a pistol with a shoulder stock with a long barrel and a short barrel, is not a short barrel rifle unless the short barrel and shoulder stock are attached to the pistol at the same time. (C.A. App. 22-24, 34.) Mr. Owen repeated this opinion in 1983. *Id.* at 38.

In sum, it is unclear to which administrative opinion the court should defer, since much of it favors Thompson/Center. Far more useful tools of construction are the rules that ambiguous taxing statutes must be interpreted in favor of the taxpayer, and that statutes with criminal penalties must be interpreted in favor of lenity.

## III. THE CIRCUITS ARE NOT IN CONFLICT

### A. No Other Reported Cases Concern a Pistol and Carbine Kit

This is a case of first impression. Other than the Court of Appeals' decision, no other Court has ever addressed whether a pistol and carbine kit intended only for making a rifle with a barrel over 21" nonetheless constitutes a rifle with a barrel under 16". The circuits are not in conflict.

The government argues that pre-1968 machinegun cases are somehow relevant, because they were decided before Congress adopted "combination-of-parts" language. (Br. 12-13, 21.) The government cites *United States* v. *Lauchli*, 371 F.2d 303, 311 (7th Cir. 1966), yet that case states "that the purchasers demanded operable machineguns, the defendant assembled seven of them. . . ." The government also relies on *United States* v. *Kokin*, 365 F.2d 595, 596 (3rd Cir. 1966), but the conviction was



affirmed "in the circumstances elaborated in the opinion of the district court . . . ." *Id.* at 596. While unpublished, that opinion was available to the court in *Lanchli*, which states: "As in *United States* v. *Kokin*, . . . this defendant even assisted in the assembly of seven of the weapons." 371 F.2d at 313.

Besides machineguns, the government discusses silencers, which are equally irrelevant to the definition of "rifle."[39] These silencer cases are further inapplicable because Congress revisited the issue in 1986, and determined which combination of parts would constitute silencers—i.e., parts "designed or redesigned, and *intended* for use in assembling or fabricating a firearm silencer."[40] This precludes combinations of parts which could be, but are not "intended" to be, assembled as silencers.[41]

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[39] The government relies on *United States* v. *Endicott*, 803 F.2d 506 (9th Cir. 1986) and *United States* v. *Luce*, 726 F.2d 47 (1st Cir. 1984). (Br. 10-12.) Unlike the pistol and carbine kit, there was only one manner in which to assemble these silencer parts, that manner was unlawful, and the parts "could be joined together within a few seconds." *Luce*, 726 F.2d at 49; *Endicott*, 803 F.2d at 509. These opinions approved jury instructions, did not state as a matter of law that all such combinations of parts were silencers, and assume that the parts in question were *intended* to be assembled as silencers. *See* 803 F.2d at 508-509. Contrary to the government (Br. 12 n.11), Congress did not codify *Luce* and *Endicott*, because those cases contain no "design and intent" requirements as does 26 U.S.C. § 5845(a)(7).

[40] 18 U.S.C. § 921(a)(24); 26 U.S.C. § 5845(a)(7). By requiring intent, the statutory amendment repudiates *Endicott* and *Luce*, which required no intent. Thus, Congress rejected these decisions on the very point for which the government relies on them—a strict liability, no intent, combination-of-parts definition for *every* NFA firearm.

[41] The silencer definition does not include combinations of parts just because they *could* be used on a firearm—rather, specific intent is required. Indeed, only a "device *for* silencing, muffling, or diminishing the report of a portable *firearm*" is included, thereby excluding a silencer or muffler for an antique firearm (which is

In *United States* v. *Woods*, 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied* 435 U.S. 906 (1978), for purposes of finding probable cause for a search, the court held that a short barrel found near the rest of a shotgun "was capable of being 'readily restored to fire a fixed shotgun shell'. . . ."[42] Nothing in the case suggests that the short barrel was possessed for some innocent, nontaxable purpose.[43] The jury may well have heard evidence that the barrel had previously been attached to the rest of the weapon. By contrast, in the case at bar, the short barrel is possessed only for use in pistol configuration.

The government claims that *United States* v. *Combs*, 762 F.2d 1343, 1345 (9th Cir. 1985) is inapplicable (Br. 14), yet that case held a person to have "made" a short barrel rifle under Section 5845(i) because he assembled it as such:

> The Uzi rifle is sold in the United States with a 16-inch barrel and has a warning imprinted on it that it is illegal to modify the weapon in any way. In addition, the instructional manual that comes with the Uzi states that to take out the 16-inch barrel and replace it with a shorter barrel creates an illegal weapon. The evidence at trial indicated that the *barrel originally attached to the rifle was detached and*

excluded from the definition of "firearm" under 18 U.S.C. § 921 (a)(3), (16)), a nonportable firearm, an airgun, or a lawn mover.

[42] None of the other cases cited by the government (Br. 10-11, 18), except *Drasen, infra*, involves a rifle. *E.g., United States* v. *Smith*, 477 F.2d 399 (8th Cir. 1973) (machinegun). In *United States* v. *Catanzaro*, 368 F. Supp. 450, 452 (D. Conn. 1973), which involved a readily restorable sawed-off shotgun, the court denied a motion to dismiss an indictment, and thus did not find that the item was an NFA firearm beyond a reasonable doubt. In neither of those cases were there legitimate, non-NFA uses for the items in question.

[43] Whether used with a shoulder stock or on a pistol, a shotgun (smooth bore) barrel under 18" makes an NFA firearm. 26 U.S.C. § 5845(a)(1), (5), (d), and (e). By contrast, the 10" Contender pistol barrel has a legitimate non-NFA purpose. Accordingly, comparisons to shotgun barrels are irrelevant.



> *the shortened barrel installed* in its place. . . . Combs *bought the shorter barrel and installed it. Thus the Uzi* was altered by Combs and therefore *was "made" within the terms of the statute. Id.* at 1347. (Emphasis added).

*United States* v. *Zeidman*, 444 F.2d 1051, 1052 (7th Cir. 1971) dealt with a semiautomatic Browning pistol with an instantly attachable shoulder stock. (*Cf.* Br. 10-11, 13). The unit was "readily restorable" as a short barrel rifle, because defendant offered for sale a "pistol with a *detachable* shoulder stock"—implying that it was on the pistol at the time—and the prospective buyer had "affixed the shoulder stock to the back of the pistol. . . . When so assembled the Browning instrument constituted a short barreled rifle." *Id.* at 1053. These items are not similar to the Contender pistol and carbine kit, the 21" barrel of which gives a legitimate purpose for the shoulder stock, which in turn is not instantly attachable.[44] Finally, *Zeidman* was decided in the context of whether probable cause to seize existed, not whether final disposition of the case by the fact finder was proper.

### B. *Drasen* Does Not Apply to the Products at Issue, and is Based on a Revoked Revenue Ruling

The primary case relied on by the government is *United States* v. *Drasen*, 665 F.Supp. 598 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied* 488 U.S. 909 (1988). However, the Contender pistol and carbine kit is easily distinguishable from this opinion in which two judges could not agree with two other judges on whether rifle parts kits can be "rifles" for purposes of a pretrial motion to dismiss the indictment.

District Judge Susan Getzendanner, in perhaps the most thorough opinion on what is an NFA firearm ever

[44] It is noteworthy that BATF now classifies the Browning semiautomatic pistol with shoulder stock as a collector's item not likely to be used as a weapon, and thus not an NFA firearm. C.A. App. 48-49.

published, rejected the government's argument that the "readily restored" definition of "rifle" includes parts from which a rifle had never been constructed, because "all persons of common intelligence understand 'restore' to mean 'return to a previous condition.' People are not required to divine the government's secret modification of that definition . . . ." 665 F. Supp. at 603. The "weapon" definition of rifle does not apply because "the court has great difficulty seeing how the never-assembled constituent parts of a rifle are themselves a weapon 'made' to fire." *Id.* at 608.

In a 2-1 opinion, the Court of Appeals reversed and remanded to allow the fact finder to decide the issue. The court framed the issue to concern "constituent parts of a rifle" (845 F.2d at 732)—again distinguishing that case from the case at bar, in which the long barrel is the part of a rifle, and the short barrel is the part of a pistol.

The *Drasen* majority uses the euphemism "common sense interpretation" when unable to explain the clearly different definitions of rifle and machinegun. *Id.* at 731. Its reading into the statute of an implicit "combination-of-parts" definition for *all* NFA firearms is plainly inconsistent with the explicit "intent" requirements in the definitions of destructive device and silencer.[45] This explains why the Congressional sponsors of new "combination of parts" language in the Firearms Owners' Protection Act of 1986 filed an amici curiae brief against the government's position in *Drasen*.[46]

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[45] The court was flatly wrong in asserting (845 F.2d at 735) that Congress did not include a combination-of-parts-plus-intent definition for "silencer." §§ 101, 109, P.L. 99-308, 100 Stat. 451, 460 (May 19, 1986).

[46] Amici included Senators Orrin E. Hatch and James A. McClure and Congressman Larry E. Craig. 845 F.2d at 732 n.4. Congressman Craig is credited with a floor amendment in the House which resulted in the new definitions of silencer and machinegun. Senators Hatch and McClure explained the new definition of machinegun,



The majority opinion in *Drasen* is based on an intellectually nihilistic inability to explain why an NFA "rifle" has no combination-of-parts definition, but three other NFA firearms do have such definitions. It is at a total loss to explain why rifle is defined as an operable "weapon"—"*intended* to be fired from the shoulder" at that—or as a "readily restorable" weapon, but that a machinegun is a weapon, a readily restorable weapon, *or* a combination of parts from which a complete weapon can be assembled.[47]

The *Drasen* majority attacks this "nonsensical statutory distinction" enacted by Congress and adds that "defendants would have us draw the conclusion that for some inexplicable reason Congress intended to distinguish short-barrel rifles."[48] 845 F.2d at 736-37. Congress can conjure up any "nonsense" it wishes, and give or not give "explicable" reasons, when it decides what to tax and

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which concerned conversion parts only. 132 CONG.REC. H1700 (Apr. 9, 1986); 132 CONG.REC. S5362-5363 (May 6, 1986).

[47] The majority inaccurrately states that the "combination-of-parts" definition means that "every single [machinegun] part could be subject to regulation." 845 F.2d at 737; *see* Br. 21. (It is unclear how this proves that rifle has some kind of implicit combination-of-parts definition.) The definition is not "any machinegun or part thereof," but is "any *combination* of parts from which a machinegun can be assembled if *such parts* are in the possession or under the control of a person." § 5845(b). As noted by Senators Hatch and Kennedy in debate on the 1986 amendments, most machinegun parts are not even regulated. 132 CONG.REC. S5362-63 (May 6, 1986).

The *Drasen* majority's argument was repudiated in *United States v. Bradley*, 892 F.2d 634, 636 (7th Cir. 1990)) because "a statutory machinegun" exists only "if one person has possession or control of *all* of the parts."

[48] As Judge Manion noted in dissent, "the definition of 'machinegun' shows that when Congress wanted to regulate combinations of parts, or 'any' parts, it knew how to do so with precision. Congress has not included such precise language in the definition of rifle." *Id.* at 738.

what not to tax, and the latter is not thereby a "loophole" for courts to abrogate.

Since it seeks to impose a strict liability, combination-of-parts definition for all NFA firearms, the *Drasen* majority carefully ignores the definition of destructive device. A combination of parts from which a destructive device "could" be assembled—such as a bottle, firecracker, and paint thinner—is not such a device unless intent to do so exists. *United States* v. *Tankersley*, 492 F.2d 962, 966-67 (7th Cir. 1974). "While the components separately have social utility, in combination they form a destructive device. . . ." *Id.* The Contender pistol and carbine kit is no more an "unassembled" short barrel rifle than certain common household containers and flammable chemicals are "unassembled" Molotov cocktails and hence "destructive devices."

*Drasen* assumes that a manufacturer of parts capable of and intended for legal assembly [49] is guilty of a tax offense because a consumer could commit a tax offense, i.e., making a short barrel rifle without following the procedures in the NFA. Yet firearms manufacturers are not responsible if a consumer commits a murder with a firearm. *Martin* v. *Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205 (7th Cir. 1984) held that "criminal misuse of a handgun is not a foreseeable consequence of gun manufacturing." If a handgun manufacturer is not responsible for a murder, it is difficult to understand why Thompson/Center is being held responsible because some consumer "could" commit a tax offense.

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[49] The court ignores that during the production process, parts which could be assembled as NFA firearms are transformed into non-NFA firearms. For instance, before rifling is cut inside a 16 inch barrel, the barrel has a smooth bore. The parts are not thereby a shotgun with a barrel less than 18". 26 U.S.C. § 5845(a)(1), (d). Similarly, a rifle barrel could be first made to be 14" in length, and then a 3" barrel attachment welded on to make a 17" barrel. The mere parts were not a short barrel rifle before completion of the welding.



The majority opinion in *Drasen* frankly admits that the pertinent terms could easily be interpreted to exclude the items in question from being NFA firearms.[50] The court thereby completely disregards the cardinal principles that tax statutes are to be construed in favor of taxpayers, and that criminal statutes are to be resolved in favor of lenity.

The government's brief is conspiciously silent about a revenue ruling on which the government relied in *Drasen* and in the Claims Court in this litigation.[51] Only on appeal did Thompson/Center discover that the agency had long ago declared the ruling to be obsolete.

The Claims Court opined that "published revenue rulings are given weight, as they represent the agency's official interpretation of the statute. . . . Rev. Rul. 54-606, 1954-2 C.B. 33, held that possession of sufficient parts to assemble a firearm constitutes possession of a firearm." [52] (Pet. App. 28a.) The Court then (*id.* n.2) cited *Drasen*, 845 F.2d at 736, which was the only prior published opinion ever to approve this 1954 Revenue Ruling.[53]

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[50] The Court admits: "Applying the facts of this case, the statute on its face is not clear. . . . It is apparent that to clarify the statute, little additional language would have been needed to accomplish what the government claims Congress intended. The statute could have defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon. . . . This definition ['make'] suggests that, to produce a firearm, 'putting together' the parts is necessary." *Id.* at 733.

[51] The government repeatedly assured the court that Revenue Ruling 54-606 had never been modified or revoked. *E.g.*, Memo. in Opp. to Plaintiff's Mot. for Sum. Jud. at 4.

[52] The ruling "does not indicate one way or another whether rifle parts need to have been once-before assembled in order to be a 'rifle.'" *United States* v. *Drasen*, 665 F. Supp. at 603, 608.

[53] *See United States* v. *Lauchli*, 371 F.2d 303, 312 (7th Cir. 1966) ("we need not go as far as the Internal Revenue Ruling [54-606]").

Instead of informing the courts that Revenue Ruling 54-606 had been declared obsolete in 1972, the prosecution in *Drasen* urged the ruling upon the courts. "When the government's rhetoric is washed aside, its position essentially comes down to a single Revenue Ruling." 665 F.Supp. at 603, 608. The *Drasen* appellate majority relied primarily on the ruling. In arguing that the Supreme Court not grant Drasen's petition for certiorari, the Solicitor General relied principally on the revenue ruling.[54]

While unknown to the Claims Court, to the *Drasen* majority, and to this Court when it considered Drasen's petition, the Department of the Treasury officially repudiated Rev. Rul. 54-606 in 1972. Because Congress clarified in the Gun Control Act of 1968 which NFA firearms would be defined as combinations of parts and which would not,[55] Rev. Rul. 72-178, 1972-1 C.B. 423-24 held:

> Numerous changes in the law . . . necessitated a review of all outstanding revenue rulings issued under Chapter[] . . . 53 of the Internal Revenue Code of 1954 [the National Firearms Act] . . .
>
> It has been determined that the following list of revenue rulings are inapplicable either in whole or in part to the current law and regulations . . . . Therefore, these revenue rulings are found to be no longer in effect, and are hereby declared to be obsolete. *Rev. Rul.No.* . . . . 54-606.

[54] *See* Memorandum for the United States in Opposition, *Drasen* v. *United States*, U.S. Sup. Ct., No. 88-430, at 2, which describes the dismissal of the indictment by the district court and states:

> The court of appeals, in a split decision, reversed (Pet. App. 1-16). The court relied on a formal ruling of the Commissioner of Internal Revenue interpreting the statute, after it was adopted in 1954, to reach the possession of sufficient parts to assemble an operative firearm. Rev. Rul. 54-606, 1954-2 C.B. 33.

The Solicitor General made several more references to the ruling and never informed the Court that the ruling had been revoked in 1972.

[55] Rev. Ruling 54-606 was not mentioned in the entire legislative record which culminated in the 1968 Act, which repudiated the content of the ruling except with regard to machineguns.



After the 1968 Act passed, Treasury adopted regulations to reflect the statutory definitions of rifle, machinegun, and destructive device *verbatim*. *See* 36 F.R. 14255, 14257-58 (Aug. 3, 1971).[56] The ruling was declared obsolete because it was "inapplicable either in whole or in part to the current law and regulations." Rev. Rul. 72-178. The "*current* law" was, of course, the 1968 amendments which clarified which firearms under the National Firearms Act include combinations of parts and which do not.

In sum, *Drasen*—the government's main "precedent"—is based on a revenue ruling which, unbeknown to the court, had been declared obsolete. The government's amnesia about its promotion of this revoked ruling illustrates the unreasonableness of its position in this case.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[56] 27 C.F.R. § 179.11 currently defines "rifle," "machinegun," and other firearms exactly as defined in 26 U.S.C. § 5845.